Ang Yee Cheng & Anor v Ang Siang Hock (person under disability suing through Koh Beng Guek, litigation representative)

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12B-71–05 OF 2013
WONG TECK MENG JC
3 SEPTEMBER 2015

Tort — Negligence — Road accident — Whether trial court wrong to have found motorcyclist 100% negligent for colliding into pedestrian — Whether trial court erred in wholly accepting testimony of purported eye-witness without testing her evidence against silent evidence in sketch plan of accident — Whether sudden emergence of 'eye-witness' seven months after accident raised doubts over her credibility — Whether sketch plan and motorcyclist's testimony showed pedestrian was not standing on side table of road but was at middle of road when collision happened — Whether liability had to be apportioned 50:50 between motorcyclist and pedestrian

Damages (Personal Injury or Death) — Personal injuries — Brain injury — Road accident victim suffered permanent residual disabilities requiring care for rest of life — Whether sessions court's awards for several heads of damages exorbitant or unwarranted — Whether wrong principles applied by trial court in assessing awards

The sessions court found the appellants 100% liable for a road accident in which the respondent was injured and awarded him RM1.3m in damages. The respondent was a pedestrian when a motorcycle ridden by the second appellant ('Lim'), and owned by the first appellant, collided into him. The sessions court relied heavily on the testimony of a woman, SP3, who claimed she saw how the accident happened. SP3 claimed she was riding a motorcycle when Lim overtook her from the right and then collided into the respondent who was standing on the side table of the road. Lim admitted during the trial that he was speeding when the accident happened. The respondent, who was 43 years and eight months old at the time of the accident, suffered a fractured skull and severe brain injury that impaired his ability to speak and caused other permanent residual disabilities which, according to a medical specialist's report, reduced his life expectancy by nine to ten years and required him to be looked after for the rest of his life. The sessions court awarded the respondent RM300,000 for the head injury, RM81,000 for the skull fracture, RM348,000 for future nursing care, RM150,800 for physiotherapy, RM119,340 for speech therapy, RM42,340 for cost of adult diapers, RM69,000 for

diaper-sore-relieving medication and RM67,080 as future loss of earnings for the respondent's wife who claimed she gave up her regular day job and worked part-time since the accident to take care of the respondent. The instant appeal against the sessions court's decision on liability and quantum excluded an agreed sum of RM135,360 as the respondent's loss of earnings.

Held, order accordingly:

(1) The silent evidence on the sketch plan ('P1') did not support SP3's version that the collision happened on the side table of the road. SP3's version was inherently improbable. The second appellant's version was probable and was supported by the silent evidence in P1 which indicated C1 (the start of the long scratch mark on the road probably caused by the motorcycle after it fell on its side after the collision) as being the point of impact. The second appellant testified that the respondent was crossing the road from right to left when the accident happened and that he was unable to avoid the respondent who, at that time, was already at the middle of the road. This attributed some negligence to the respondent (see paras 9 & 18–19)

(2) The trial court erred in rejecting the second appellant's version of the accident and deciding that the collision happened on the side table of the road based merely on SP3's evidence without testing it against the silent evidence. The trial court should have considered whether SP3's version was inherently probable as it seemed to go against common sense and logic. There was no evidence the second appellant had lost control of his motorcycle and no silent evidence to corroborate SP3's evidence that the motorcycle ended up on the side table of the road. It was doubtful whether SP3 was at the scene. According to the investigating officer, SP1, there were no eye-witnesses but somehow seven months after the accident, SP3 appeared as a witness by lodging a police report seven months after the accident. SP3 claimed that after witnessing the accident she went to the respondent's house to inform his family about it. But if this was true, this was not recorded in the police report lodged by the respondent's wife nor did the wife inform SP1 of the existence of SP3 as a witness (see paras 13–17 & 20).

(3) It was clear from the evidence that the respondent was crossing the road when the accident happened. As the road was quite wide, there was ample opportunity for the second appellant to have avoided the accident if he had been paying attention. He admitted that he was rushing at the time. Taking into consideration all the facts and circumstances of the accident, liability had to be apportioned 50:50 as the second appellant was negligent whilst the respondent had contributed to it by crossing the road without making sure it was safe to do so (see paras 21–23).

(4) Applying the global award principle, the fractures to the skull were related and interlinked with the head injury and the disabilities the respondent now suffered arose from the entire and same injury to the skull and brain. Accordingly, the fractures to the skull and the head injury had to be assessed together and not separately and going by the trend of awards, RM250,000 was a fair and reasonable global award for the head injury in the instant case. The amount given by the sessions judge was excessive (see paras 33–34, 41 & 43).

(5) While the RM1,000 a month awarded by the trial court for nursing care was an appropriate multiplicand, it was wrong to have awarded that sum on the basis of a life span of 72 years (864 months) without taking into account the contingency that the respondent might not live up to that age given the specialist medical report that his present condition might shorten his life span by nine to ten years. As the parties agreed that 72 years was the average life span of a Malaysian male, and the respondent was 524 months old at the time of the accident, the correct multiplier was the difference between those two figures less one-third for contingencies (see paras 46–47 & 49–51).

(6) The trial court was wrong to have awarded RM150,800 for physiotherapy by allowing two sessions a week (totalling RM100) multiplied by 29 years despite the non-existence of any recommendation from medical specialists that the respondent required such treatment. As the respondent could obtain such treatment at the government hospital for a fraction of the cost, if not for free, he should obtain treatment there to mitigate damages. A more reasonable award was RM100 for transportation cost per trip once a week for four years which equalled RM19,200 (see paras 56 & 58–59).

(7) The award of RM119,340 for speech therapy was wrong as there was no necessity for the respondent to be taught to speak (at RM85 per session) for the rest of his life. There was no medical evidence that he needed this treatment. Speech therapy was available at the government hospital and the respondent had a duty to mitigate damages. The proper award for this head of damages was RM100 for transport at once a week for four years (reasonable period for maximum improvement), giving a figure of RM19,200 (see paras 60–62).

(8) The trial court was wrong to have awarded, based on a multiplier of 29 years, RM42,340 for cost of adult diapers and RM69,000 for medicine to relieve sores from wearing them. As two diapers a day was sufficient for the respondent's usage, the award for the diapers should be RM27,200 based on RM120 per month using a multiplier of 226.67 months (the same multiplier used for cost of future nursing care). There was no medical evidence the respondent suffered sores from wearing diapers and

as he could obtain such medication from the government clinic, which he visited every month, for free, this claim had to be disallowed (see paras 63–69).

(9) The award of RM67,080 as future loss of earnings of the respondent's wife ('SP4') had to be set aside as she was not a claimant in these proceedings and therefore could not be awarded any compensation for any purported loss suffered by her. She was not a direct victim of the accident and the damages in question were too remote and unforeseeable. The caregiver, SP7, looked after the respondent from morning till evening and there was no necessity for SP4 to have given up her day job. The respondent was already given an award for nursing care and the amount sought by SP4 amounted to double compensation (see paras 71–73 & 76).

[Bahasa Malaysia summary

Mahkamah sesyen mendapati perayu-perayu bertanggungjawab 100% untuk kemalangan jalanraya di mana responden cedera dan mengawardkan RM1.3 juta sebagai ganti rugi. Responden seorang pejalan kaki apabila motorsikal yang ditunggang oleh perayu kedua ('Lim'), dan dimiliki oleh perayu pertama, melanggarnya. Mahkamah sesyen bergantung sepenuhnya kepada keterangan seorang wanita, SP3, yang mendakwa dia telah melihat bagaimana kemalangan itu berlaku. SP3 mendakwa dia sedang menunggang motorsikal apabila Lim memotongnya dari sebelah kanan dan kemudian melanggar responden yang sedang bersiri di tepi penjuru jalan. Lim mengaku semasa perbicaraan bahawa dia sedang memecut apabila kemalangan itu berlaku. Responden, yang berumur 43 tahun dan lapan bulan pada masa kemalangan itu, mengalami keretakan pada tengkorak dan kecederaan otak yang teruk yang menjejaskan keupayaannya untuk bercakap dan menyebabkan ketidakupayaan kekal lain yang, menurut laporan pakar perubatan, memendekkan jangka hayatnya selama Sembilan atau sepuluh tahun dan menghendakinya dijaga seumur hidupnya. Mahkamah sesyen telah mengawardkan responden RM300,000 untuk kecederaan kepala, RM81,000 untuk keretakan tengkorak, RM348,000 untuk penjagaan kejururawatan masa depan, RM150,800 untuk fisioterapi, RM42,340 untuk kos lampin dewasa, RM69,000 untuk ubat melegakan sakit lampin dan RM67,080 sebagai kehilangan pendapatan masa depan untuk isteri responden yang mendakwa dia telah berhenti kerja harian biasanya dan bekerja separuh masa sejak kemalangan itu untuk menjaga responden. Rayuan ini terhadap keputusan mahkamah sesyen berhubung liabiliti dan kuantum telah mengecualikan jumlah yang dipersetujui iaitu RM135,360 sebagai kehilangan pendapatan responden.

Diputuskan, perintah seperti dipohon:

(1) Keterangan pada pelan lakaran ('P1') tidak menyokong versi SP3 bahawa

pelanggaran itu berlaku di tepi penjuru jalan. Versi SP3 memang mustahil. Versi perayu kedua lebih berkemungkinan dan disokong oleh keterangan dalam P1 yang menunjukkan C1 (permulaan tanda gores panjang atas jalan yang mungkin disebabkan oleh motorsikal itu selepas ia jatuh pada tepinya selepas pelanggaran itu) sebagai tanda impak itu. Perayu kedua telah memberi keterangan bahawa responden telah menyeberang jalan dari kanan ke kiri apabila kemalangan itu berlaku dan bahawa dia tidak dapat mengelak responden yang mana, pada masa itu, telahpun berada di tengah jalan. Ini telah menyebabkan kecuaian kepada responden (lihat perenggan 9 & 18–19).

(2) Mahkamah perbicaraan terkhilaf kerana menolak versi perayu kedua tentang kemalangan itu dan memutuskan bahawa pelanggaran itu berlaku di tepi penjuru jalan berdasarkan hanya pada keterangan SP3 tanpa mengujinya dengan keterangan senyap itu. Mahkamah perbicaraan sepatutnya mempertimbangkan sama ada versi SP3 memang mustahil kerana ia dilhat bertentangan dengan akal dan logik. Tiada keterangan yang perayu kedua telah hilang kawalan motorsikalnya dan tiada keterangan senyap untuk menyokong keterangan SP3 bahawa motorsikal itu akhirnya berada di tepi penjuru jalan. Ia meragukan sama ada SP3 berada di tempat kejadian. Menurut pegawai penyiasat, SP1, tiada saksi utama tetapi bagaimanapun tujuh bulan selepas kemalangan itu, SP3 muncul sebagai saksi dengan membuat laporan polis tujuh bulan selepas kemalangan itu. SP3 mendakwa bahawa selepas menyaksikan kemalangan itu dia telah pergi ke rumah responden untuk memberitahu keluarganya tentang kemalangan itu. Namun jika ini benar, ia tidak direkodkan dalam laporan polis yang dibuat oleh isteri responden dan isteri itu tidak memberitahu SP1 tentang kewujudan SP3 sebagai saksi (lihat perenggan 13–17 & 20).

(3) Adalah jelas daripada keterangan bahawa responden telah menyeberang jalan apabila kemalangan berlaku. Oleh kerana jalan itu agak luas, terdapat peluang yang mencukupi untuk perayu kedua mengelak kemalangan itu jika dia menumpukan perhatian. Dia mengakui bahawa dia sedang bergegas pada masa itu. Setelah mengambil kira semua fakta dan keadaan kemalangan itu, liabiliti hendaklah dibahagikan 50:50 kerana perayu kedua telah cuai manakala responden telah menyumbang kepadanya dengan melintas jalan tanpa memastikan ia selamat untuk berbuat demikian (lihat perenggan 21–23).

(4) Dengan mengguna pakai prinsip award secara global, keretakan pada tengkorak berkaitan dan saling berkait dengan kecederaan kepala dan ketidakupayaan responden yang dialaminya timbul daripada kecederaan yang menyeluruh dan sama kepada tengkorak dan otak. Sewajarnya, keretakan kepada tengkorak dan kecederaan kepala hendaklah ditaksir bersama dan bukan secara berasingan dan berdasarkan tren award,

RM250,000 adalah award global yang adil dan munasabah untuk kecederaan kepala dalam kes ini. Jumlah yang diberikan oleh hakim mahkamah sesyen adalah berlebihan (lihat perenggan 33–34, 41 & 43).

(5) Di mana RM1,000 sebulan diawardkan oleh mahkamah perbicaraan untuk penjagaan kejururawatan adalah pendarab yang sesuai, ia adalah salah untuk mengawardkan jumlah tersebut atas dasar jangka hayar 72 tahun (864 bulan) tanpa mengambil kira kontingensi bahawa responden mungkin tidak akan hidup sehingga umur itu berdasarkan laporan pakar perubatan bahawa keadaannya kini mungkin memendekkan jangka hayatnya sembilan ke sepuluh tahun. Sepertimana dipersetujui oleh pihak-pihak bahawa 72 tahun adalah purata jangka hayat lelaki Malaysia, dan responden adalah 524 bulan pada masa kemalangan itu, pengganda yang betul adalah perbezaan antara dua angka tersebut kurang satu pertiga untuk kontingensi (lihat perenggan 46–47 & 49–51).

(6) Mahkamah perbicaraan adalah salah kerana mengawardkan RM150,800 untuk fisioterapi dengan membenarkan dua sesi seminggu (berjumlah RM100) diganda dengan 29 tahun meskipun ketidakwujudan apa-apa syor daripada pakar perubatan bahawa responden memerlukan rawatan sedemikian. Oleh kerana responden boleh mendapatkan rawatan sedemikian di hospital kerajaan untuk sebahagian kecil daripada kos itu, jika tidak secara percuma, dia sepatutnya mendapat rawatan di situ untuk mengurangkan ganti rugi. Award yang lebih munasabah adalah RM100 untuk kos pengangkutan satu perjalanan seminggu sekali selama empat tahun yang bersamaan RM19,200 (lihat perenggan 56 & 58–59).

(7) Award RM119,340 untuk terapi pertuturan adalah salah kerana tiada keperluan untuk responden diajar bercakap (pada RM85 setiap sesi) untuk sepanjang hidupnya. Tiada keterangan perubatan yang dia memerlukan rawatan ini. Terapi pertuturan telah tersedia di hospital kerajaan dan responden mempunyai kewajipan untuk mengurangkan ganti rugi. Award yang wajar untuk kepala ganti rugi ini adalah RM100 untuk pengangkutan seminggu sekali selama empat tahun (tempoh munasabah bagi peningkatan maksimum) (lihat perenggan 60–62).

(8) Mahkamah perbicaraan adalah salah kerana mengawardkan, berdasarkan pengganda 29 tahun, RM42,340 untuk kos lampin dewasa dan RM69,000 untuk ubat bagi melegakan sakit daripada memakainya. Oleh kerana dua lampin sehari adalah mencukupi untuk penggunaan responden, award untuk lampin itu hendaklah RM27,200 berdasarkan RM120 sebulan menggunakan pengganda 226.67 bulan (pengganda sama digunakan untuk kos penjagaan kejururawatan masa depan). Tiada keterangan perubatan yang responden mengalami sakit daripada memakai lampin dan oleh kerana dia boleh mendapat ubat daripada klinik kerajaan, yang dilawatinya setiap bulan, secara percuma, tuntutan ini tidak boleh dibenarkan (lihat perenggan 63–69).

(9) Award RM67,080 sebagai kehilangan pendapatan masa depan isteri responden ('SP4') perlu diketepikan kerana dia bukan penuntut dalam perosiding ini dan oleh itu tidak boleh diawardkan apa-apa pampasan untuk apa-apa kehilangan yang dikatakan telah dialami olehnya. Dia bukan mangsa secara langsung kemalangan itu dan ganti rugi yang dipersoalkan terlalu jauh dan tidak dapat diramalkan. Penjaga, SP7, telah menjaga responden dari pagi hingga petang dan tiada keperluan untuk SP4 berhenti kerja siangnya. Responden telahpun memberikan award untuk penjagaan kejururawatan dan jumlah yang dipohon oleh SP4 merupakan pampasan berganda (lihat perenggan 71–73 & 76).]

Notes

For cases on brain injury, see 6(2) *Mallal's Digest* (5th Ed, 2015) paras 710–720.

For cases on road accident, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 1790–2092.

Cases referred to

Anis Aqilah bt Othman (seorang yang tak berkeupayaan (pesakit) di bawah s 3(1) Ordinan Sakit Otak 1952 mendakwa melalui sahabat wakil, Nor Azidah bt Haji Idris) v Mohamed bin Don & Anor (Halidi bin Mahnud – Third Party) [2011] 1 PIR [27], Sc (refd)

Bujang bin Mat & Anor v Lai Tzen Hai & Anor [2004] 6 MLJ 376, HC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Ganesan a/l Rengasamy v Subramaniam a/l Krishnan Kutti [2011] 2 PIR [42], Sc (refd)

Ibrahim b Said v Asiyah bt Hussain [2010] 1 PIR [55], Sc (refd)

Lee Ewe Teik v Ariffin bin Hussain 12 [1877] Mallal's Digest (5th Ed, 2015), HC (refd)

Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)

Mariappan & Anor v Siti Rahimah bte Ibrahim [1990] 1 MLJ 99, SC (refd)

Mohd Shair b Abd Wahid (mendakwa melalui bapa dan sahabat wakilnya Abdul Wahid b Yeop Sohor) & 2 Ors v Abd Rahman b Hj Abd Kadir (bapa dan wakil diri kepada estet Abd Wahab bin Abdul Rahman) [2011] 2 PIR [77], Sc (refd)

Mohd Sukri bin Mohd Kanawi v Md Yahya b Mat [2013] 1 PIR [22], Sc (refd)

Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30, FC (refd)

Norezah bt Mohd v Mohd Zaki b Mohamad Anis (seorang budak dan mendakwa melalui bapa yang sah dan sahabat wakilnya, Mohamed Aris b Derim) [2011] 1 PIR [8], Sc (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)

Sunitha Kaur Sandhu (Ajmer Sandhu & Ong) for the appellants.
Goh Jun Geng (Murali & Assoc) for the respondent.

Wong Teck Meng JC:

INTRODUCTION

[1] This is an appeal against this court decision made on 17 June 2015 of allowing the appeal of the appellant (defendant) in respect of the sessions court judge's decision on liability which was on 100% against the defendants and quantum for RM1.3m.

FACTS

[2] In this accident which happened on 29 April 2010 at about 11pm, the plaintiff as pedestrian was collided into by a motorcycle bearing registration No PJN 5516 ridden by the second defendant. The first defendant is the owner of the said motorcycle. The accident happened on Jalan Raja Uda, Butterworth.

FINDINGS

[3] In the exercise of my appellate jurisdiction, I am minded to refer to the case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA) which states:

> (1) It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial judge to which the law entrusts the primary task of evaluation of the evidence. However, the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself, that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[4] In the Federal Court case of *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 it was held that:

> [2] It is settle principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the factual findings of the court below be disturbed by the appellate court unless it appears that those findings are clearly wrong; and it is even more undesirable to do so where the conclusions reached, to a large extent, depended on the credibility of the witness and the impression formed by the court which has seen them and judged their honesty and accuracy.
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> [3] However, there is clear authority that a distinction can be drawn between the finding of a specific fact which depends upon the credibility of witness, and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and for an independent opinion. Thus, in cases where there is no question of the

credibility or reliability of any witness, or where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to review and evaluate the evidence as the trial judge. In the instant appeal, there was nothing in the trial judge's judgment which indicated that her decision was based on the credibility of the witness or the impression she formed of them.

With the above stated guidelines, I now determine whether the decision if the sessions court judge is correct or not.

ISSUE OF LIABILITY

[5] I have carefully fine combed the evidence that was adduced at the trial and have considered the versions of how the accident happened.

[6] The version of the plaintiff heavily relies on the evidence of SP3 Lim Swee Swee who was purportedly at the scene of the accident at the material time. In her testimony she was riding her motorcycle on Jalan Raja Uda when she saw the accident happened.

[7] According to SP3, the second defendant who was on the motorcycle overtook her from the right and thereafter collided into the plaintiff who was standing by the roadside intending to cross the road. On the sketch plan P1, SP3 and the second defendant were travelling from the bottom to the top. SP3 stated and marked X on photograph P2A as the spot the plaintiff was standing when the second defendant's motorcycle collided into him. Point X is the side table of the road on which the plaintiff was standing. SP3 marked AA on the sketch plan P1 as the spot X.

[8] Now, I will look at P1 for silent evidence whether it supports the version of the accident given by SP3. On P1 there is a scratch mark beginning from C1 to C2 on the road between A and A1. According to the investigating officer SP1 Sargeant Razali bin Leman he was of the opinion that the scratch mark was likely from the second defendant's motorcycle, as there was no other accident at the material time. SP1 said that C1 was the starting of the scratch mark ending at C2. This scratch mark was new. In addition, SP1 testified that the motorcycle was found at the scene near to C2.

[9] Having considered the silent evidence found on P1, it s clear that the silent evidence does not support the version of SP3 that the collision happened in the side table of the road. It is my finding that C1 must be the point of impact which is about 1.2 meters from A and not on the side table as claimed by SP3.

[10] After the collision, the said motorcycle could have fallen and slided on the road from C1 to C2 which is about 22 meters. The scratch mark could have

A been caused by the footrest after the motorcycle fell on its side. Indeed, the left footrest of the motorcycle had scratch mark.

[11] My finding that the impact must be at C1 is reinforced by the Federal Court case of *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 at p 176 which held that, 'The line of the scratch, if projected backwards from 'S' beyond 'K' would still be on the road and gives some clue to the point of impact'.

[12] The importance of silent evidence has been aptly stated by Edgar Joseph J (as he then was) in the case of *Lee Ewe Teik v Ariffin bin Hussain* 12 [1877] Mallal's Digest (5th Ed, 2015) where it held that:

> In the instant case, the photographs, plans and measurements of the scene and the nature of the damage to each vehicle must provide the most reliable guides to which the version of P and the driver of the motor/lorry can be tested.

[13] Hence, the sessions court judge by arriving at his decision based merely on the evidence given by SP3 without testing his evidence against the silent/neutral evidence was in error when he decided that the collision/impact was on the side table of the road. Had the sessions court judge directed his mind on the sketch plan, he would have arrived at a different conclusion as to the point of impact.

[14] Next, the sessions court judge should have considered whether the evidence given by SP3 as to how the collision occurred is inherently probable. It is against common sense and logic that the second defendant would have ridden the motorcycle after overtaking SP3's motorcycle went on to the left side of the road and for no reason or rhythm grazed against the second respondent who was standing inside the side table of the road.

[15] There is no evidence that the second defendant lost control of his motorcycle as he approached the plaintiff. There is no silent evidence to corroborate SP3's evidence that the second defendant's motorcycle ended up on the side table of the road.

[16] Furthermore, I have some doubts as to whether SP3 was at the scene of the accident on that fateful night. According to SP1, there were no eye witnesses in his investigation into this case but somehow seven months after the accident, SP3 appeared as a witness by lodging a police report P6 on 28 November 2010. SP3 statement to the police was only recorded on 24 April 2012 by SP1. According to SP3, after witnessing the accident, she went to the house of the plaintiff and informed his family about the accident.

[17] However, the fact that SP3 was the one who went to the plaintiff's house to inform his family was not recorded in the police report P4 dated 6 May 2010 made by SP4 Koh Beng Guek, wife of the plaintiff. Logically speaking, if what SP3 said is the truth, by 6 May 2010 when SP4 lodged P4, she would have informed SP1 of the existence of this witness SP3.

[18] Be that as it may, since the sessions court judge had accepted her (SP3) as an eyewitness to the accident, SP3's version of the accident is inherently improbable based on my reasonings stated above. Hence, what the plaintiff has proven is that the accident happened but the impact is somewhere at C1 of P1 attributing some negligence on the part of the second defendant.

[19] The second defendant (SD1) gave evidence, that the plaintiff was crossing the road from right to the left when the accident happened. SD1 said that he was unable to avoid the plaintiff who was at that time on the middle of the road. The police report dated 7 May 2010 of SD1 marked as D5 sets out how the accident happened. Hence, the version given by SD1 is probable and supported by the silent evidence in P1 which indicates C1 being the point of impact.

[20] Therefore, the sessions court judge was in error in his assessment of SD1's evidence and rejecting his version on flimsy grounds, one of which is SD1 made his police report D5 eight days late from the date of the accident despite the fact that SD1 had given a reasonable explanation for the delay that is he was also injured in the accident and was unable to lodge it on the same day. The sessions court judge appeared to be biased towards SD1 over his delay in making the police report but did not question the seven months delay in the lodging of police report by SP3.

[21] In the event, from the version given by the plaintiff and defendants, it is clear that the plaintiff was crossing the road when the accident occurred, which is an error of judgment on his part. I do not think that the plaintiff would have attempted to cross the road if it was not clear of oncoming vehicles. On the other hand, since the road is quite wide, there was ample opportunity for the second defendant to avoid the accident.

[22] From the long scratch mark C1–C2, SD1 must have been riding his motorcycle at a high speed. SD1 had admitted in evidence that he was rushing to a scene of accident as he working in the towing service as a callman. Hence, if the second defendant had paid proper attention on the road, he would be able to brake in time and prevent the accident from happening.

[23] Therefore, taking into consideration all the facts and circumstances of the accident, liability should be apportioned at 50:50% as the second

defendant was negligent whilst the plaintiff had contributed to it by crossing the road without making sure it was absolutely safe to do so.

[24] The finding of the sessions court judge on the issue of liability is wrong in law and in fact. I therefore, set it aside and substituted it with 50:50% liability.

ISSUE OF QUANTUM

[25] When dealing with appeal on the quantum awarded by the trial court, principle in the *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239 (FC) applies that is, 'appellate court can only interfere with the award of damages by the trial judge if it is shown that the trial judge has acted on a wrong principle of law or that he has misapprehended the facts or he has made a wholly erroneous estimate of the damage suffered'.

GENERAL DAMAGES

[26] There are four medical/specialist reports involved:

(a) Hospital Seberang Jaya dated 8 February 2011;

(b) Gleneagles Medical Centre dated 20 February 2012;

(c) Island Hospital dated 12 March 2012; and

(d) Gleneagles Medical Centre dated 19 June 2012.

[27] Having considered all these medical/specialist reports, the plaintiff suffered the following injuries to his skull/head, namely:

(a) fracture right occipital bone and right lambdoid suture diastasis;

(b) fracture right squamotemporal bone and right parietal bone;

(c) fracture of sphenoid sinus;

(d) left frontoparietal acute subdural haematoma with cerebral oedema; and

(e) brain confusion.

[28] The disabilities/residuals suffered by the plaintiff as a result of the above stated injuries are:

(a) unable to move right upper limb;

(b) weakness of right lower limb or right hermiparesis – able to stand independently for short while, walk short distance with assistance of another;

(c) severe speech impairment;

(d) able to eat by himself using the left hand;

(e) can indicate when he wants to pass urine or open his bowels;

(f) post traumatic epilepsy;

(g) post traumatic encephalomalacia (loss of volume) of brain; and

(h) brain damage.

[29] The Gleneagles Medical Centre specialist report dated 19 June 2012 commented that, 'The patient is now severely disabled. He requires the assistance of another person for his activities of daily living everyday. He needs assistance of transferring from the wheelchair to the mattress and vice versa for bathing, cleaning and dressing. He is able to eat by himself using the left hand. He can indicate when he wants to pass urine or open his bowels and an urinal will be offered to him or he will be placed on a commode chair. The neurological disabilities will be permanent'.

[30] Furthermore this report states that the plaintiff's life expectancy is reduced by about nine to ten years due to the severity of the motor dysfunction occasioned by his severe brain injury.

[31] The sessions court judge awarded:

(a) RM300,000 for head injury; and

(b) RM81,000 for skull fracture

[32] The appellant submits that one global award should be given to the injury to the head as 'skull fractures' and 'head injury' are closely linked and interrelated.

[33] I agree with the appellants submission that a global award should be given in this case as the fractures to the skull are related and inter linked with the head injury and the disabilities that the plaintiff now suffers arise from the entire and same injury to the skull and brain.

[34] In *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30 (FC), it was held that '(1) the fractures and other connected injuries in this case should be assessed together and not separately and then just added up at the end because they are not separate heads of compensations'. Hence, applying the global award principle, the fractures to the skull and head injury should be assessed together and not separately.

[35] The respondent cited *Anis Aqilah bt Othman (seorang yang tak berkeupayaan (pesakit) di bawah s 3(1) Ordinan Sakit Otak 1952 mendakwa melalui sahabat wakil, Nor Azidah bt Haji Idris) v Mohamed bin Don & Anor (Halidi bin Mahnud – Third Party)* [2011] 1 PIR [27] where for the following injuries:

(a) depressed fracture of the occipital bone;

(b) fracture of the left tibia;

(c) multiple cerebral concussion; and

(d) severe head injury (cerebral concussion, right intranventricular haemorrhage and cerebral oedmea) with disabilities such as:

(i) bedridden;

(ii) hypotonic lower limbs with reduced reflexes;

(iii) lead pipe ridgidity of the upper limbs, more to the right side;

(iv) no communication with the surrounding; and

(v) totally dependant for daily needs for the rest of her life, RM350,000 was awarded.

[36] The next case of *Mohd Sukri bin Mohd Kanawi v Md Yahya b Mat* [2013] 1 PIR [22] cited by the respondent where:

(a) severe head injury – severe cerebral concussion hypodensity in the left frontal lobe with skull widening and gyral thinning as well as enlargement of the frontal horn of the left lateral ventricle consistent with encephalomalecia, encephalomalacia in the left frontal lobe extending to the right temporal lube and is the left parietal lobe, ventricles moderately enlarged, immediate unconsciousness with Glasgow Coma Score 7/15 at time of admission and post amnesia for more than seven days and disabilities such as:

(i) Impaired mental functions – slow spontaneous speech and interrupted by pauses, reading is slow and impaired memory and risk of post traumatic epilepsy in future.
RM250,000 was awarded.

[37] The defendants on the other hand, quoted the following cases:

Norezah bt Mohd v Mohd Zaki b Mohamad Anis (seorang budak dan mendakwa melalui bapa yang sah dan sahabat wakilnya, Mohamed Aris b Derim) [2011] 1 PIR [8] where RM160,000 was awarded for severe head injury (contusion in the right medulla oblongata and basal ganglia).

[38] *Mohd Shair b Abd Wahid (mendakwa melalui bapa dan sahabat wakilnya*

Abdul Wahid b Yeop Sohor) & 2 Ors v Abd Rahman b Hj Abd Kadir (bapa dan wakil diri kepada estet Abd Wahab bin Abdul Rahman) [2011] 2 PIR [77] where RM120,000 was awarded for severe head injury with severe permanent focal and diffuse damage of the brain, resulting from base of skull fracture, right temporal skull fracture with confusion, left parietal extradurall haemorrhage and subarachnoid haemorrhage.

[39] *Ganesan a/l Rengasamy v Subramaniam a/l Krishnan Kutti* [2011] 2 PIR [42] where RM120,000 was awarded for severe head injury with skull fracture and intracranial bleeding of subdural types resulting in impaired intuition and reduced sense of responsibility as a consequence of post injury neurobehavioral changes – plaintiff as a result of the injuries needs nursing care.

[40] *Ibrahim b Said v Asiyah bt Hussain* [2010] 1 PIR [55] where RM180,000 was awarded for bleeding in the right ear, encephalomalacia of the right frontal and left temporal lobes with enlargement of sylvian fissue and ventricles of the brain, loss of consciousness with GSC of 8/15, fracture of medial malleolus, fracture of left parietal bone with bone contusion – plaintiff is now bedridden and wheelchair bound and requires full nursing care.

[41] After taking in consideration the injuries and the resultant disabilities suffered by the plaintiff and comparing them with the awards given in the above stated cases, for similar injuries and disabilities, I am of the considered view that RM250,000 should be the award for the head injury in the case here. The award of RM300,000 given by the sessions court judge is on the high side and excessive.

[42] In the case of *Anis Aqilah bte Othman*, the disabilities were more severe than the plaintiff here as the plaintiff there was totally bedridden and was in a vegetable stage. The cases quoted by the defendants are not as severe as this present case, except for the case of *Ibrahim b Said*.

[43] Hence, my award of RM250,000 is fair and reasonable in the circumstances. The award of the sessions court judge for RM300,000 is set aside and is substituted with RM250,000 as a single global award for head injury. The award for RM81,000 for skull fracture is also set aside.

SPECIAL DAMAGES

[44] The plaintiff's loss of earnings has been agreed at RM135,360.

A FUTURE NURSING CARE

[45] SP7, a retired nurse gave evidence that she provides nursing care to the plaintiff from 9am to 6pm. She charges RM1,000 for the service rendered. SP7 also helped the plaintiff to exercise his limbs which is termed as passive physiotherapy.

B

[46] There were no receipts given or issued by SP7 to prove payments made to her for her nursing care. Be that as it may, I agree with the sessions court judge discretion to award RM1,000 a month for nursing care, irrespective whether the plaintiff's wife continues to engage with SP7 or in lieu thereof a full time maid who can take care of the plaintiff on a full day basis.

C

[47] However, what is wrong here is that sessions court judge applied a direct multiplier approach (72 years – 43 years (the plaintiff's age at time of accident)) which amounts to 348 months without making a deduction for contingencies of life and accelerated payment.

D

[48] In *Bujang bin Mat & Anor v Lai Tzen Hai & Anor* [2004] 6 MLJ 376, five approaches have been adopted by our courts in determining the multiplier in assessment of cost of nursing care where a person is prognosed to require nursing care for the rest of his life. The approach, that I wish to follow is stated in *Bujang bin Mat* case at p 389:

E

F

> (iv) by taking the life expectancy minus age at time of accident less one-third for contingencies and using direct multiplier. The cases that have adopted this approach are *Chandra Sekaran A/L Krisnan Nair & Anor v Ayub bin Mohamed & Anor* [1994] MLJU 82; *Zainab bin Ahmad lwn Kereta api Tanah Melayu* [2000] 5 MLJ 620; *Nazori bin Teh & Anor v Teh Lye Seng & Anor* [1996] 1 AMR 706.

G

[49] The fact that the plaintiff's life span may be shortened by nine to ten years due to his present condition is clearly stated in the Gleneagles Medical Centre Specialist report dated 19 August 2012.

H

[50] Hence, to award the plaintiff on the basis of a life span of 72 years without taking into account the contingency that he may not live up to that age was an error of law in which the sessions court judge had misdirected himself and applied the wrong principles.

I

[51] Parties have agreed 72 years as the average life span of a Malaysian male. The plaintiff was 43 years and 8 months (ie 524 months) at the time of the accident. Hence, the correct calculation should be (864 months - 524 months) x 2/3 = 226.67 months.

[52] By taking RM1,000 as the multiplicand, which is a more than sufficient amount to engage a maid to take care of the plaintiff full time, instead of a part time nurse, the award under this heading should be RM1,000 x 226.67 months = RM226,670. Therefore, I set aside the award of RM348,000 and substitute it for RM226,670.

COST OF PHYSIOTHERAPIST

[53] SP5 did physiotherapy to the plaintiff and he charged RM50 per session. According to him, the plaintiff needs about three times a week. SP5 is not a qualified physiotherapist but has about 12 years experience in this line with Loh Guan Lye Hospital.

[54] The need for physiotherapy is not supported by any of the specialist medical reports and/or no medical specialist gave evidence on the plaintiff's need for this treatment. SP5 agreed that he was not carrying out physiotherapy which was advised or supervised by a doctor. Furthermore SP5 agreed that physiotherapy treatment can be obtained at the government hospital.

[55] It is my finding that since this head of claim is not supported by medical evidence, the plaintiff simply created this claim to inflate damages which are not really necessary or recommended by a doctor.

[56] The sessions court judge is therefore wrong when he awarded RM150,800 by allowing two sessions a week multiplied by 29 years despite the non existence of any recommendation from medical specialists for this treatment. The sessions court judge is in error again for not considering that this treatment can be obtained at the government hospital for a fraction of the price charged by SP5, or free of charge.

[57] Furthermore, there is not an iota of evidence suggesting that the plaintiff needed this treatment for the rest of his life ie 29 years. Be that as it may, the plaintiff should obtain this treatment at the government hospital. As to how long such treatment is needed by the plaintiff, there must be a fixed period to be determined as there is a time frame where the usefulness or otherwise of this treatment does not make any more difference to the plaintiff.

[58] Hence, taking into consideration that this treatment can be obtained at the government hospital, it is my considered view that the plaintiff should obtain treatment there to mitigate damages. As for the length of time for the treatment, a four years period is reasonable with once a week frequency.

[59] However, in order for the plaintiff to go to the government hospital for the treatment, he needs transport. My estimate for the transport should be

about RM100 each trip. The award therefore, should be RM100 x 4 x 4 years = RM19,200. The sessions court's award of RM150,800 is therefore set aside and substituted with RM19,200.

COST OF SPEECH THERAPIST

[60] A speech therapist SP6 was engaged to improve the plaintiff's condition in respect of his aphasia. Again, there are no medical reports recommending this treatment or evidence that the plaintiff needed this treatment. SP6 charged RM85 per session and said that the plaintiff treatment might take a long time. It is my considered view that there must be a fixed time period where the treatment reaches a plateau after which there is not much more that the speech therapist can do to help the plaintiff.

[61] It is also the evidence of SP6 that speech therapy service is available at the government hospital. Hence, the plaintiff has the duty to mitigate damages. The proper and correct award for this head of damages should be RM100 for transport multiplied by four (once a week) for 4 years (reasonable period for maximum improvement). The amount is RM19,200.

[62] Hence, the award given by the sessions court judge for RM119,340 is wrong as there is not necessity for the plaintiff to be taught to speak for the rest of his life. This claim is also created by the plaintiff to inflate the damages. I therefore set aside the award of RM119,340 and substitute it with RM19,200.

COST OF ADULT DIAPERS AND MEDICATIONS

[63] It is the evidence of SP4 (the plaintiff's wife) that the plaintiff does not need to wear pampers a year ago as at the date of this trial. However, SP4 said that he still needs pampers for certain occasions and at night. It is my considered view that it is fair for the plaintiff to wear adult pampers at night and part of the daytime.

[64] Hence two pieces of adult pampers a day is sufficient for the plaintiff's usage. Per piece of adult pampers costs roughly RM2. Per day for two pieces of adult pampers, the cost is RM4. For a month of 30 days it is RM120 for adult pampers. Hence, using the multiplier of 226.67 months, the cost of adult pampers is RM27,200.

[65] Hence, the sessions court judge award for RM42,340 based on a multiplier of 29 years was in error and is now set aside and substituted with RM27,200.

[66] For medicines, that SP6 bought for the plaintiff, she tendered some receipts from a pharmacy but there were no details on the receipts about the medicines bought. SP6 testified that the medicines are to relieve the rashes or sores that came about from wearing pampers, vitamins and protein. But all these details were not stated in the receipts. However, SP6 acknowledged that the plaintiff gets his monthly medications for epilepsy from Mak Mandin Government Clinic.

[67] It is gainsaid that whatever medicines that the plaintiff needs can be obtained from the government clinic for free and since the plaintiff goes to the clinic every month, he should be able to get the necessary additional medicines there.

[68] Hence, the sessions court judge should not have awarded RM69,000 based on RM2,400 multiplied by 29 years for the medicine for sores as a result of wearing the pampers. Furthermore, there is no medical reports or evidence that he has such sores.

[69] Hence, as the plaintiff should be able to obtain his medications from the government clinic, this claim should not be allowed. The award of RM69,000 is therefore set aside.

FUTURE LOSS OF EARNINGS OF WIFE

[70] The plaintiff's wife SP4 claimed that she has to now work part time since the accident as she has to take care of the plaintiff in the morning before the part time nurse arrives. According to SP4 she has to do the household chores before 9am and by 6pm, she has to be back home to take over the duties of the family from the part time nurse. Hence, she claimed for her future loss of earnings at RM860 per month which the sessions court judge awarded for RM67,080 (RM860 x 6.5 years).

[71] It is my considered view that the award should not be given as the wife SP4 is not claimant in these proceedings and therefore cannot be awarded any compensation for any purported loss suffered by her. She is also not a direct victim of the accident and such a damage is too remote as an injured party is not to be compensated for damage which is not forseeable to the reasonable man.

[72] From the facts, the caregiver SP7 was looking after the plaintiff from morning to evening and as such there was not necessity for SP4 to give up her day job. Giving up her day job for half her salary was her choice because she still has to take care of her children, cooking for them and sending them to school and then pick them up as part of her daily family chores.

[73] Furthermore, the plaintiff has been awarded for a claim for nursing care and as such this claim amounts to double compensation. The plaintiff is only entitled to nursing care and not future loss of earnings of his wife. The plaintiff's counsel quoted *Mariappan & Anor v Siti Rahimah bte Ibrahim* [1990] 1 MLJ 99 where the Supreme Court held that parents were entitled to compensation in money for service rendered for taking care of their child who was injured in the accident under the item of nursing care to justify the claim for future loss of earnings of SP4.

[74] In my view, *Mariappan*'s case does not assist the plaintiff at all as the claim there was for nursing care which was rendered by the victim's parents who did not hire any caregiver to take care of the victim.

[75] Hence, the parents there were entitled to claim for nursing care. The case is not about claim for loss of future earnings of the parents there. *Mariappan*'s case does not in anyway assist the plaintiff with regards this head of claim.

[76] Hence, I set aside the erroneous award given by the sessions court judge for future loss of earnings of SP4.

CONCLUSION

[77] I allowed the appeal with costs of RM6,000 to the appellant.

Order accordingly.

Reported by Ashok Kumar